

**Senator Cornyn's Questions to Attorney General Eric Holder**

Senate Judiciary Committee – November 18, 2009

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SEN. LEAHY: Thank you. Thank you very much, Senator Durbin.

Senator Cornyn.

SEN. JOHN CORNYN (R-TX): Thank you.

Mr. Attorney General, please forgive my voice. We're going to try to croak through this together.

ATTY GEN. HOLDER: (Chuckles.) Okay.

SEN. CORNYN: But let me just ask, do you acknowledge the legitimacy -- the legitimacy of military commissions?

ATTY GEN. HOLDER: Absolutely. I think that what Congress has done in response to the Supreme Court concerns in reforming the military commissions -- military tribunals has legitimized them, and makes them places in which people can be referred and tried. And it was one of the reasons why I sent five of those people there on last Friday.

SEN. CORNYN: And so your decision to try some of these 9/11 co-conspirators in an Article III Court is not compelled by any law; it was a matter of your judgment and discretion.

ATTY GEN. HOLDER: A matter of my judgment and my discretion, my experience, my interaction with the secretary of Defense, my interaction with prosecutors both on the military side and on the civilian side. All of that went into making that determination.

SEN. CORNYN: Does the president of the United States agree with you?

ATTY GEN. HOLDER: I believe that he does. I've not had a direct conversation with him. I've seen reports indicating that he agrees with the decision that I made. But the decision I made I think is consistent with his Archives speech, where he laid out how he viewed how the detainees at Guantanamo should be handled.

SEN. CORNYN: Well, you acknowledge that you work for the president of the United States -- he could fire you if he disagreed with you; that he could overrule you -- correct?

ATTY GEN. HOLDER: I -- yes, he -- he could do that.

SEN. CORNYN: Well, I want to ask you, you mentioned that that we are currently offering Miranda rights or reading Miranda rights to suspected terrorists on the battlefield. Is that correct?

ATTY GEN. HOLDER: No, what I said was that happens very, very rarely. It happened during the Bush administration. It happens very rarely.

I've talked to the FBI about this. There was some misreporting about the notion that people captured on the battlefield were automatically being read their Miranda warnings. And the reality is, there are thousands of people who are captured, and a very, very small number have been read Miranda warnings, after military lawyers, civilian lawyers, investigators from both sides made the determination that there was some reason to give Miranda warnings to those captives.

SEN. CORNYN: And you support that decision, to give Miranda rights to some suspected terrorists?

ATTY GEN. HOLDER: Well, give them, you know, Miranda warnings if that means it's going to preserve an option for us. And I think that's why it's done.

SEN. CORNYN: And you support it?

ATTY GEN. HOLDER: Well, I would support it to the limited extent that it is done. I defer to the people in the field who make these determinations and, I think, you know, are capable of making those determinations, given the facts that they have to confront that are right in front of them.

SEN. CORNYN: And should have the -- should Khalid Sheikh Mohammed been read his Miranda rights?

ATTY GEN. HOLDER: There's no need -- I don't -- there was no need.

SEN. CORNYN: Well --

ATTY GEN. HOLDER: We don't need his statements.

SEN. CORNYN: With all due deference, you're not going to be the ultimate arbiter of that decision. It will be a judge, won't it, at the trial or appellate level? Correct?

ATTY GEN. HOLDER: Yes, that's true, if that's -- if that's an issue that they raise on appeal, should there be an appeal. But I'm confident that the way in which this case is going to be structured that, given the way in which and the various places in which we will be able to find statements that he made, that the need for Miranda warnings -- there is no need for Miranda warnings, or was no need for Miranda warnings. SEN. CORNYN: Well, he did ask for a lawyer, didn't he, when he was detained?

ATTY GEN. HOLDER: I, frankly, don't know.

SEN. CORNYN: You're not aware of the fact that he asked for a lawyer and he said he wanted to go to New York?

ATTY GEN. HOLDER: Yes, I do remember that. Yes, that's -- that's correct, "I want a lawyer and I want to go to New York." I remember those two, yes.

SEN. CORNYN: And he's getting his wish, I guess. When did he first get a lawyer; do you know?

ATTY GEN. HOLDER: No, I don't know the exact date.

SEN. CORNYN: Do you acknowledge the possibility that a judge, consistent with what you believe to be sound policy of providing Miranda rights to some suspected detainees, would conclude that Khalid Sheikh Mohammed was denied his rights, and thus he cannot be prosecuted for the crimes for which you anticipate charging him?

ATTY GEN. HOLDER: Well, Senator, you've been a judge; I've been a judge. And there's no -- I can't say, you can't say, no one can say with any 100 percent degree of certainty that a judge would not look at a particular set of facts and rule a particular way. And yet, as I look at the facts surrounding the interaction with Khalid Sheikh Mohammed, the detention of him, the evidence that we will present at trial, I am very confident that Miranda issues are not going to be a part of that trial.

SEN. CORNYN: Well, General Holder, you've been a judge; I've been a judge. And you -- you're correct to acknowledge the fact that you won't make that decision, I won't make that decision: Some judge will make that decision. Just like you said: You're not -- you're not going to defer to Khalid Sheikh Mohammed in determining the venue where he's going to be tried; you're the one making that decision.

But isn't the fact that you won't be the one making that decision, ultimately, if an attempt to transfer a venue based on the notoriety of this event on 9/11 is such -- just like Timothy McVeigh, who killed so many Americans in Oklahoma, he was tried in Colorado. Isn't it a distinct possibility that a judge would transfer this case based on a local prejudice?

ATTY GEN. HOLDER: Sure. That's entirely possible. And there may be a motion for a venue change. But just as in the McVeigh case, the venue change did not have a material negative impact on the outcome of the trial. He was convicted, and he was executed.

SEN. CORNYN: Well, in terms of local security arrangements -- I mean, this case might be tried in Connecticut, or Vermont, some other part of the 2nd Circuit. And you can't control that; I can't control that. The judge is ultimately going to make that decision, correct?

ATTY GEN. HOLDER: Well, I would think that one of the things a judge would take into account -- again, we're speculating here about the possibility of this case being moved -- would hope that --

SEN. CORNYN: You have to consider all the possibilities, don't you -- (inaudible) -- assessing the risk?

ATTY GEN. HOLDER: We consider the possibilities, and I would hope that the judge would take into account, in deciding where the case would be tried, the very real security concerns that this trial would present. SEN. CORNYN: And you said that if Khalid Sheikh Mohammed is acquitted, he will not be released.

What if a federal judge orders the Department of Justice to release him? Will you -- will you defy that order?

ATTY GEN. HOLDER: We have taken the view that the judiciary does not have the ability necessarily to certainly require us to, with people who are held overseas, to release them. It's hard for me to imagine a set of circumstances, given the other things that we could do with Khalid Sheikh Mohammed -- there are other things that we can do with him, aside from simply immigration things. There are other legal things we can do with him. It's hard for me to imagine a set of circumstances under which, if he were acquitted, that he would be released into the United States. There are other -- there are other matters. There are other things that we have the capacity to do, other legal matters that can -- other -- that we can bring.

SEN. CORNYN: Well, you recognize the Supreme Court has said you can't hold somebody indefinitely, for example, who can't be repatriated to their home country.

ATTY GEN. HOLDER: You can certainly hold people in connection with matters that are pending, and we have the capacity to make sure that Khalid Sheikh Mohammed is not released into the United States.

SEN. CORNYN: My time's expired. Thank you.

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SEN. KLOBUCHAR: Thank you, Senator.

Senator Cornyn.

SEN. CORNYN: Thank you very much, Madame Chairman. I don't know if we're going to get through this or not, but let's try.

I want to follow up on a question that Senator Specter asked, about admissibility of evidence and deciding which forum you would try these defendants. Is it your position that it's going to be easier to get evidence of their guilt in an Article III court than it will be -- than it would be in a military commission?

ATTY GEN. HOLDER: I'm not sure I view it that way as opposed to, what kind -- what evidence would be used in the Article III courts, in connection with the cases that I've already made the determination should go there, as opposed to what -- the way in which the military prosecutors wanted to conduct the case?

SEN. CORNYN: Well, surely you wouldn't decide in your discretion to try a case in a tribunal, where it would be harder to get a conviction, would you?

ATTY GEN. HOLDER: No. I mean, what I take into account are all of the factors that are a part of the protocol.

SEN. CORNYN: You mentioned a marshals report on the potential venues where this case could be tried. And as you noted, a judge could -- contrary to your wishes, contrary to my wishes -- transfer it to another venue other than New York City.

Based on the marshals report, what other venues are you prepared to try this case?

ATTY GEN. HOLDER: Well, I asked the marshals not to look at the entirety of the United States but really just to look at two districts and the courthouses in two districts and to make a determination, as to where in those two districts the case -- the case -- the case could be best tried.

And so --

SEN. CORNYN: Where was the other one?

ATTY GEN. HOLDER: I looked at the Eastern District of Virginia, as well as the Southern District of New York.

SEN. CORNYN: And those are the only two.

ATTY GEN. HOLDER: Those are the two I asked the Marshals Service to look at.

SEN. CORNYN: When the detainees come to the United States, will they have some immigration status?

ATTY GEN. HOLDER: I am not an immigration expert. I do not know what their status might be. I am confident, however, that given the fact that they would be here under the supervision of -- and as a result of their being charged in a federal court, that we would be able to detain them, that we would be able to hold them as we would do anybody who was charged with such serious crimes.

SEN. CORNYN: Are you aware of any bar to their ability to claim asylum, or argue that they should not be removed from the U.S. because of the convention against torture? (Pause.)

ATTY GEN. HOLDER: Again, I'm not a -- an immigration expert. One can be paroled into the United States solely for this -- for this purpose, but there's no right to be here after. I can't imagine a situation in which these people would be paroled into the United States for that purpose.

SEN. CORNYN: So is it your position they will not be conferred rights that they did not previously have by virtue of their coming to the United States?

ATTY GEN. HOLDER: That is my belief, but again, I am not an immigration expert. I am confident -- my expertise deals more on the Department of Justice side, and I'm confident to go on that side. We can detain them safely and prevent them from ever walking the streets of the United States.

SEN. CORNYN: I understand. We can't all be an expert in everything, and the law is complicated, but will you acknowledge that it's possible -- or let me ask you if you'll look into whether if a detainee claims an immigration status by virtue of their presence on U.S. soil, it will allow them to immediately trigger (tandem?), administrative and federal judicial immigration proceedings? Will you look into that?

ATTY GEN. HOLDER: Okay. I can look into that, because I would not be able to answer that question today.

SEN. CORNYN: And if the detainee's acquitted, or there's a mistrial -- let's say one juror decides to hang up this jury -- on what basis do you believe that you could permanently detain Khalid Sheikh Mohammed or any other of the 9/11 detainees. Is that on the basis of the Supreme Court Decision, on the basis of a statute that Congress has passed? What's the foundation of that belief?

ATTY GEN. HOLDER: Well, the initial determination that a judge would make for the detention of Khalid Sheikh Mohammed would be one that would last beyond a mistrial, if, for instance, there were a trial and a determination made -- a hung jury. We would -- I suppose the defense could move to have his bail -- detention -- his detention status changed. It's hard for me to imagine that a judge, having heard the evidence and making that initial determination, as I'm confident a judge would, to hold him -- seeing that he is a danger and flight risk -- would then change that status of Khalid Sheikh Mohammed between the time of a hung jury and the next trial.

SEN. CORNYN: I believe the Supreme Court has held that you cannot indefinitely detain somebody unless -- under the Zlabidas (ph) case. But let me just ask -- final question -- are you concerned that a judge may say you've made an election -- an election to try these terrorists as a criminal, and you're bound by that election, and you cannot go back and revert to the laws of war in order to claim that you can indefinitely sustain -- detain that individual? Are you worried about that?

ATTY GEN. HOLDER: No, I'm not. I think that under the congressional provisions that we have and the -- and the laws of war, that we have an ability to -- you cannot, perhaps, indefinitely detain somebody, but you certainly can detain somebody for lawful reasons.

Again, I don't think that we are going to be facing that possibility. We're talking about very extreme hypotheticals, I believe, based on my understanding of the evidence and the law, and the ability of our prosecutors to present a very strong case.

SEN. CORNYN: I hope you're right.

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